

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GEORGE STOBA, *et al.*,

Plaintiffs,

v.

SAVEOLOGY.COM, LLC, *et al.*,

Defendants.

Case No. 13-cv-2925-BAS(NLS)

ORDER:

**(1) GRANTING IN PART AND
DENYING IN PART TWC’S
MOTION TO DISMISS; AND**

**(2) GRANTING SAVEOLOGY’S
AND ELEPHANT’S MOTIONS TO
DISMISS**

[ECF Nos. 2, 3, 4]

On October 8, 2013, Plaintiffs George Stoba and Daphne Stoba commenced this action for alleged unlawful recordings or monitoring of telephone calls. Thereafter, Defendants Saveology.com, LLC (“Saveology”), Elephant Group, Inc. (“Elephant”), and Time Warner Cable (“TWC”) removed this action to federal court. Defendants now each separately moves to dismiss under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs oppose.

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** TWC’s motion to dismiss, and **GRANTS** Saveology’s and Elephant’s motions to dismiss.

1 **I. BACKGROUND**

2 According to the complaint, on November 25, 2012, Mr. Stoba conducted an
3 internet search using the term “Time Warner Cable,” and Ms. Stoba subsequently made
4 a telephone call to Defendants. (Compl. ¶ 19.) During Ms. Stoba’s telephone call, she
5 “provided her confidential information, including, but not limited to her telephone
6 number, address, and email address.” (*Id.*) Shortly thereafter, Plaintiffs allege that
7 Defendants called Ms. Stoba “in an attempt to sell Time Warner Cable service . . . ,
8 during which the male caller stated that [sic] ‘Hi, this is Time Warner Cable.’” (*Id.*)
9 On the same day, Mr. Stoba also called Defendants.

10 The next day, Defendants called Mr. Stoba again “in an attempt to sell Time
11 Warner Cable service to Plaintiffs, during which the male caller stated that [sic] ‘I’m
12 with Time Warner Cable.’” (Compl. ¶ 20.) During this telephone call, “the male caller
13 identified himself as ‘Joseph’ and further stated that he was with Saveology, an
14 authorized dealer of Time Warner Cable.” (*Id.*) Plaintiffs allege that “[d]uring the end
15 of this last telephone call . . . , ‘Joseph’ stated that he wanted to let him know their call
16 was being recorded for quality assurance purposes.” (*Id.*) Mr. Stoba’s alleged
17 response to Joseph was “that he did not consent to their call being recorded and that it
18 was illegal to record a telephone call in California without consent.” (*Id.*)

19 Plaintiffs allege that “Defendants recorded and/or monitored all of these multiple
20 telephone conversations with Plaintiffs in the course of Defendants’ attempt to sell
21 Time Warner Cable service to Plaintiffs.” (Compl. ¶ 21.) They further allege that “[a]t
22 no time during any of these calls were the Plaintiffs ever informed at the beginning of
23 the telephone calls that their telephone calls were being recorded and/or monitored[,]”
24 and “[a]t no time did Plaintiffs give their consent to Defendants for their telephone
25 calls to be recorded and/or monitored.” (*Id.*) According to Plaintiffs, during the
26 relevant time period, Defendants “had a policy and a practice of recording and/or
27 monitoring telephone conversations with consumers[,]” and “Defendant’s [sic]
28 employees and agents [were] directed, trained and instructed to, and [did], record

1 and/or monitor telephone conversations with Plaintiffs and other California residents.”
 2 (Compl. ¶ 22.)

3 On October 8, 2013, Plaintiffs commenced this class action against Defendants,
 4 asserting three causes of action: (1) Unlawful Recording or Monitoring of Telephone
 5 Calls under California Penal Code § 632; (2) Unlawful Recording of Telephone Calls
 6 under California Penal Code § 632.7; and (3) Unlawful and Unfair Business Acts and
 7 Practices in violation of California Business and Professions Code § 17200 (Unfair
 8 Competition Law, or “UCL”). Then on December 6, 2013, Defendants removed this
 9 action to federal court. Defendants each filed separate briefs moving to dismiss under
 10 Rule 12(b)(6). TWC moves to dismiss the complaint in its entirety, and Saveology and
 11 Elephant move to dismiss Plaintiffs’ UCL cause of action. Plaintiffs oppose all of the
 12 motions.

13 14 **II. LEGAL STANDARD**

15 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
 16 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
 17 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must
 18 accept all factual allegations pleaded in the complaint as true and must construe them
 19 and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill*
 20 *v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a Rule
 21 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather, it
 22 must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
 23 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when the
 24 plaintiff pleads factual content that allows the court to draw the reasonable inference
 25 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.
 26 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts
 27 that are ‘merely consistent with’ a defendant’s liability, it stops short of the line
 28 between possibility and plausibility of ‘entitlement to relief.’” *Iqbal*, 556 U.S. at 678

1 (quoting *Twombly*, 550 U.S. at 557).

2 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”
3 requires more than labels and conclusions, and a formulaic recitation of the elements
4 of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v.*
5 *Allain*, 478 U.S. 265, 286 (1986)) (alteration in original). A court need not accept
6 “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference the court
7 must pay to the plaintiff’s allegations, it is not proper for the court to assume that “the
8 [plaintiff] can prove facts that [he or she] has not alleged or that defendants have
9 violated the . . . laws in ways that have not been alleged.” *Associated Gen. Contractors*
10 *of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

11 Generally, courts may not consider material outside the complaint when ruling
12 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
13 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the
14 complaint whose authenticity is not questioned by parties may also be considered.
15 *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on
16 other grounds). Moreover, the court may consider the full text of those documents,
17 even when the complaint quotes only selected portions. *Id.* It may also consider
18 material properly subject to judicial notice without converting the motion into one for
19 summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

20 As a general rule, a court freely grants leave to amend a complaint which has
21 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when
22 “the court determines that the allegation of other facts consistent with the challenged
23 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*
24 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

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1 III. DISCUSSION

2 A. California Penal Code Sections 632 and 632.7

3 TWC argues that the causes of action brought under California Penal Code §§
 4 632 and 632.7 should be dismissed for two reasons: (1) because TWC cannot be held
 5 criminally liable under §§ 632 and 632.7; and (2) because “there are no facts alleged
 6 from which an inference can reasonably be drawn that TWC aided or abetted
 7 Saveology in failing to provide notice that calls were being recorded, or that Saveology
 8 and TWC conspired to not provide the notice, or even that TWC caused the notice to
 9 not be provided.” (TWC’s Mot. 5:3–11, 6:11–21.) Relying also on California Penal
 10 Code § 31, the latter reason presumes that Plaintiffs assert the causes of action for
 11 criminal liability rather than civil liability. (*See id.* at 5:3–10.)

12 Section 632 is part of California’s invasion-of-privacy statutory scheme. It
 13 provides, in relevant part, that “[e]very person who, intentionally and without the
 14 consent of all parties to a confidential communication, by means of any electronic . .
 15 . device . . . records the confidential communication” violates the statute. Cal. Penal
 16 Code § 632(a). Accordingly, “the three elements that Plaintiff must prove are (1) an
 17 electronic recording of (or eavesdropping on); (2) a ‘confidential’ communication;
 18 [where] (3) all parties did not consent.” *Weiner v. ARS Nat’l Servs., Inc.*, 887 F. Supp.
 19 2d 1029, 1032 (S.D. Cal. 2012) (Lorenz, J.) (citing *Flanagan v. Flanagan*, 27 Cal. 4th
 20 766, 774-76 (2002)). Furthermore, California Penal Code § 637.2 authorizes a private
 21 civil right of action for any violation of § 632. Even though the California Legislature
 22 “chose to impose penal as well as civil sanctions,” the reach of § 637.2 “would be the
 23 same if the Legislature had adopted three separate statutes—one declaring that the
 24 prohibited conduct was unlawful, a second specifying the civil sanctions that could be
 25 imposed upon such unlawful conduct, and a third specifying the penal sanctions that
 26 could be imposed for such conduct—and had placed the first two statutes in the Civil
 27 Code and the third in the Penal Code.” *Kearny v. Salomon Smith Barney, Inc.*, 39 Cal.
 28 4th 95, 116 n.6 (2006).

1 Here, there is no indication in Plaintiffs' complaint that they are pursuing
 2 criminal claims against TWC. TWC also fails to provide any legal authority that
 3 imposes criminal standards—namely, that criminal liability for the acts of another
 4 requires actively engaging in the criminal activity by advising, encouraging, aiding or
 5 abetting it—when pursuing civil liability under §§ 632 and 632.7. TWC only cites
 6 California Penal Code §§ 31, 632, and 632.7 in addition to *Twombly* in their motion in
 7 order to support their argument. But upon reviewing the aforementioned statutes as
 8 well as *Twombly*, the Court cannot identify any proposition that imposes any criminal
 9 standards in pursuing civil liability under §§ 632 and 632.7.

10 In sum, the Court rejects TWC's argument that the §§ 632 and 632.7 causes of
 11 action must be dismissed. Plaintiffs are within their right to assert an action solely for
 12 civil liability under these statutes. *See Kearney*, 39 Cal. 4th at 116 n.6. Both parties
 13 address whether Plaintiffs adequately allege "aiding and abetting" in order for Plaintiffs
 14 to sustain their §§ 632 and 632.7 causes of action. However, the Court need not
 15 address TWC's argument that Plaintiffs fail to adequately assert their §§ 632 and 632.7
 16 causes of action because that argument presumes that a criminal standard—specifically,
 17 under California Penal Code § 31—applies. As the Court found above, such criminal
 18 standards do not apply to Plaintiffs' §§ 632 and 632.7 *civil* causes of action.
 19 Accordingly, the Court **DENIES** TWC's motion to dismiss as to Plaintiffs' §§ 632 and
 20 632.7 causes of action.

21 22 **B. California Business and Professions Code § 17200**

23 Defendants each argue that Plaintiffs lack standing to assert their UCL cause of
 24 action because they fail to allege an "injury in fact and loss of money or property" as
 25 a result of Defendants' alleged unfair practice in their complaint. (TWC's Mot.
 26 7:1–9:20; Saveology's Mot. 5:8–6:22; Elephant's Mot. 5:8–6:22.) In response,
 27 Plaintiffs contend that they assert sufficient facts to assert an injury in fact under
 28 California Business and Professions Code § 17204 because their "primary asserted

1 injury is violation of their statutory right of privacy under California Penal Code §§
 2 632, 632.7.” (Def.’s TWC Opp’n 17:18–28.) They also argue that because they only
 3 seek injunctive relief, § 17200’s standing requirement that a plaintiff must have “lost
 4 money or property” does not apply. (*Id.* at 22:3–6.) It is worth noting that Saveology’s
 5 and Elephant’s motions and replies are nearly identical, presenting the same argument
 6 nearly verbatim. The same can also be said for TWC’s motion and reply with respect
 7 to its challenge to Plaintiffs’ UCL cause of action.

8 California’s Unfair Competition Law (“UCL”) prohibits “any unlawful, unfair
 9 or fraudulent business act or practice[.]” Cal. Bus. & Prof. Code § 17200. This cause
 10 of action is generally derivative of some other illegal conduct or fraud committed by
 11 a defendant. *Khoury v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993).

12 Standing to bring a UCL action requires “a person who has suffered injury in fact
 13 and has lost money or property as a result of the unfair competition.” Cal. Bus. & Prof.
 14 Code § 17204. To have standing under the UCL, a plaintiff must sufficiently allege
 15 that (1) he or she has lost “money or property” sufficient to constitute an “injury in
 16 fact” under Article III of the Constitution, and (2) there is a “causal connection”
 17 between the defendant’s alleged UCL violation and the plaintiff’s injury in fact. *Rubio*
 18 *v. Capital One Bank*, 613 F.3d 1195, 1203-04 (9th Cir. 2010) (citing *Birdsong v. Apple,*
 19 *Inc.*, 590 F.3d 955, 959-60 (9th Cir. 2009); *Hall v. Time Inc.*, 158 Cal. App. 4th 847,
 20 855-56 (2008)); *see also Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011).

21 To show an economic injury, a plaintiff may (1) surrender in a transaction more,
 22 or acquire in a transaction less, than he or she otherwise would have; (2) have a present
 23 or future property interest diminished; (3) be deprived of money or property to which
 24 he or she has a cognizable claim; or (4) be required to enter into a transaction, costing
 25 money or property, that would otherwise have been unnecessary. *Kwikset*, 51 Cal. 4th
 26 at 885-86. Though “lost money or property” as an economic injury is a “classic form
 27 of injury in fact,” it is not the exclusive means of establishing an injury in fact under
 28 California’s UCL. *See id.* at 323-24.

1 In *Walker v. Geico General Insurance Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009),
 2 the Ninth Circuit addressed a plaintiff's challenge to a district court's ruling that he
 3 lacked standing under California's UCL. The court noted that the amended UCL
 4 statute requires a plaintiff to establish that he has "suffered an injury in fact and has lost
 5 money or property." *Id.* (quoting *Californians for Disability Rights v. Mervyn's, LLC*,
 6 39 Cal. 4th 223, 227 (2006)) (internal quotation marks omitted). The plaintiff in
 7 *Walker* took the position that "although he cannot establish the requisite 'lost money
 8 or property' for the purposes of monetary relief under the UCL, he is nevertheless
 9 entitled to an injunction[.]" *Id.* The Ninth Circuit concluded that the plaintiff's
 10 argument "is supported neither by the language of the amended statute nor its purpose."
 11 *Id.* (citing *Buckland v. Threshold Enters. Ltd.*, 155 Cal. App. 4th 798, 817 (2007)
 12 ("Because remedies for individuals under the UCL are restricted to injunctive relief and
 13 restitution, the import of the requirement is to limit standing to individuals who suffer
 14 losses of money or property that are eligible for restitution."); *see also Walker v. USAA*
 15 *Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007).

16 Similarly, Plaintiffs suggest here that the "lost money or property" requirement
 17 for standing to pursue a UCL action under § 17204 does not apply to them because they
 18 are only seeking injunctive relief. However, as the Ninth Circuit found in *Walker*,
 19 Plaintiffs are mistaken. *See Walker*, 558 F.3d at 1027; *see also Buckland*, 155 Cal.
 20 App. 4th at 817. In order to have standing to pursue a UCL action, Plaintiffs must
 21 allege facts that demonstrate lost money or property. *See id.* Plaintiffs fail to do so
 22 here. They also fail to direct this Court's attention to any allegations in the complaint
 23 that provide any facts plausibly demonstrating lost money or property. Therefore,
 24 based on the allegations in the complaint, Plaintiffs lack standing to pursue their UCL
 25 action, and the Court **GRANTS** Defendants' motions to dismiss as to Plaintiffs' UCL
 26 cause of action. *See Cal. Bus. & Prof. Code* §§ 17200, 17204; *Walker*, 558 F.3d at
 27 1027.

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1 **IV. CONCLUSION & ORDER**

2 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**
3 TWC's motion to dismiss, and **GRANTS** Saveology's and Elephant's motions to
4 dismiss. Specifically, the Court **DISMISSES WITHOUT PREJUDICE** only
5 Plaintiffs' UCL cause of action as to all of the defendants.

6 The Court also **GRANTS** Plaintiffs' request for leave to file an amended
7 complaint to cure any deficiencies in the complaint. *See* Fed. R. Civ. P. 15(a).
8 Consequently, if Plaintiffs choose to amend their UCL cause of action, they must do
9 so no later than **August 11, 2014**.

10 **IT IS SO ORDERED.**

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12 **DATED: July 18, 2014**

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14 **Hon. Cynthia Bashant**
15 **United States District Judge**